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No. 08-1566

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BRITTANY McCOMB and MARIANNA McCOMB, by her best friend, CONSTANCE J. McCOMB,

Petitioners,

v.

GRETCHEN CREHAN, ROY THOMPSON, and CHRISTOPHER SEFCHECK, individually and in their official capacities as employees of Foothill High School, and the Clark County School District, a political subdivision of the State of Nevada, and WALT RULFFES, in his official capacity as Superintendent of the Clark County School District, a political subdivision of the State of Nevada, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether public school officials can properly prevent a student speaker from engaging in proselytizing speech at a public high school sponsored and controlled graduation ceremony in order to avoid violation of the Establishment Clause of the First Amendment.

II. Whether the school officials met the jurisdictional requirement of Rule 4 of the Federal Rules of Appellate Procedure when they filed their interlocutory appeal with the Ninth Circuit Court of Appeals within 30 days of the United States District Court's denial of their motion to dismiss the amended complaint.

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INTRODUCTION

On at least two recent occasions, this Court has denied petitions for certiorari based on circumstances that were remarkably similar to this case. *Lassonde v. Pleasanton Unified Sch. Dist.*, 540 U.S. 817 (2003); *Niemeyer*[1] *v. Oroville Union High Sch. Dist.*, 532 U.S. 905 (2001).[2] The same result is warranted here.

Petitioners have failed to present any "compelling reasons" for their Petition for a Writ of Certiorari ("Petition") to be granted. *See* Sup. Ct. R. 10. Petitioners fail to demonstrate that the Ninth Circuit's March 20, 2009, unpublished Memorandum Opinion ("Ninth Circuit Opinion") is in conflict with a decision of this Court or another Court of Appeals, or that the Ninth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). In addition, the Ninth Circuit's Opinion lacks precedential value and is not worthy of review by this Court. Therefore, the Petition should be denied.

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1. This was an appeal of *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000). The case involved two students: Ferrin Cole (who gave a sectarian invocation) and Chris Niemeyer (who gave a proselytizing valedictory speech). When appealed to the Supreme Court only Niemeyer was a party. For consistency, the case will be commonly referred to as "*Cole*" in this brief.

2. The Rutherford Institute, who has attorneys participating as co-counsel for Petitioners in this case, should be very familiar with *Cole* and *Lassonde* as it was involved in those actions as well.

STATEMENT OF THE CASE

A. Nature Of The Case

Petitioner Brittany McComb ("McComb") was a valedictorian speaker at a public high school sponsored and controlled graduation ceremony. Her speech was edited because it contained proselytizing content that, if allowed to be delivered, would have violated the Establishment Clause of the First Amendment. Ms. McComb's sister, Marianna McComb, then a student at Foothill High School, through her mother, Constance McComb, is also a party to this action. Petitioners filed this action claiming that the actions of Principal Gretchen Crehan, Assistant Principal Roy Thompson, district employee Christopher Sefcheck, and Superintendent Walt Rulffes (the "School Officials") violated their First and Fourteenth Amendment rights.

B. Parties To The Proceeding

The School Officials would like to point out that the Clark County School District ("the school district") is not a named party. This is not clear by the manner in which Petitioners have phrased the caption of the Petition and the parties to the proceeding section. In the proceedings below, the school district was listed merely as an employer of Respondents Crehan, Thompson, and Sefcheck. *See e.g.*, Petitioners' Appendices 17 (hereinafter "Pet. App.").

C. Counter Statement Of Facts

An accurate statement of the facts appears below.

1. The School Officials Had Plenary Control Over The Public School Sponsored Graduation Ceremony And The Content And Delivery Of McComb's Speech

The School Officials, including Principal Crehan and Assistant Principal Thompson, in their official capacities, were in charge of the planning and execution of all aspects of the Foothill High School ("Foothill") graduation ceremonies of June 15, 2006. Am. Compl. ¶¶ 25-27 (Pet. App. 29).

McComb was selected to be one of three class valedictorians solely on the basis of her grade point average. Am. Compl. ¶¶ 15-17 (Pet. App. 24). All valedictorian speakers, including McComb, were required to submit their graduation speeches to Assistant Principal Thompson for review in advance of the graduation ceremony. Am. Compl. ¶¶ 34-35 (Pet. App. 30-31). The School Officials retained primary and final authority over the content of McComb's graduation speech and did, in fact, exercise this control by asking McComb to change the content of her speech as originally submitted. Am. Compl. ¶¶ 35-43 (Pet. App. 30-32).

The school sponsored graduation ceremony was held at the Orleans Arena in Las Vegas, Nevada. The facility was rented and insured by the school district for the high school graduation ceremony. As acknowledged in

the Amended Complaint, "[Respondents] were in charge of all or part of the program and/or facilities at the Arena during the graduation." Am. Compl. ¶¶ 103-104 (Pet. App. 51-52). Additionally, McComb's speech was broadcast over a microphone and amplification system that was controlled by school officials acting in their official capacities. Am. Compl. ¶¶ 7, 57, 59 (Pet. App. 21, 35).

Control over the graduation ceremony and content of the student speeches is also evident from the regulations and guidelines established by the school district. Petitioners repeatedly mischaracterize Clark County School District Regulation 6113.2.

Regulation 6113.2 did not require the School Officials to permit McComb to address the crowd in her own words as suggested by Petitioners. First, the reference to unrestricted speech in Regulation 6113.2(IV) is clearly *conditioned* upon the student *actually retaining* "primary control over the content of their expression."[3] (Pet. App. 3-4). McComb did *not* have primary control over the content of her speech. Second, the neutral disclaimer language of Regulation 6113.2(IV) is inapplicable by its own terms because McComb's speech was plainly attributable to the school based on the school's control over the graduation

3. CCSD Regulation 6113.2(IV) provides, in relevant part, with emphasis added: "Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and *retain primary control over the content of their expression*, however, that expression is not attributable to the school and, therefore, may not be restricted because of its religious (or anti-religious) content."

ceremony and the content of the speech. Third, McComb's speech did not fall within the purview of Regulation 6113.2(III) because it was not "[s]tudent initiated *non-school sponsored* religious speech."[4] (Pet. App. 3) (emphasis added).

Additional evidence of control can be seen in an April 21, 2003, guidance memorandum distributed by the school district's General Counsel (at the Superintendent's direction) to the district's Executive Cabinet. The guidance provided:

> Commencement exercises, as well as student assemblies and similar activities, are clearly *school sponsored activities.* The Superintendent has directed that prior to such activities, student speeches shall be reviewed for content. When an administrator reviews student speech, she will *substantially control*

4. Petitioners also rely upon the federal guidance issued by the Secretary of Education under the Elementary and Secondary Education Act of 1965 (as amended by the No Child Left Behind Act of 2001), in an attempt to establish that McComb retained primary control over her speech. The federal guidance is inapposite in this case. The guidance document itself recognizes that where school officials do in fact "substantially control" the content of what is expressed, which occurred in this case, the speech is attributable to the school and may not include prayer or other specifically religious (or anti-religious) content. The federal guidance also does not prohibit regulation of proselytizing speech. *See* Dep't of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools* (Feb. 7, 2003) (http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html) (last visited Sept. 17, 2009).

> *the speech* by ensuring that it *does not* contain speech which interferes with the educational process, is lewd, profane, threatening, *proselytizing* or constitutes prayer. A *neutral disclaimer does not absolve* the administrator of the responsibility to review and monitor the speech.

See Am. Compl. ¶¶ 64D-64F (Pet. App. 39-40); Ninth Circuit ER 98[5] (emphasis added).

Finally, Petitioners have misinterpreted the school's instructions regarding commencement speeches. (Pet. App. 5). The document contains various instructions and limitations on the content as well as presentation of the valedictorian speeches, which is further evidence of the administration's plenary control over the graduation ceremony and the speeches. *Id.*

2. The Unedited Version Of McComb's Speech Contained Proselytizing Comments

After reviewing McComb's draft speech, Principal Crehan and Assistant Principal Thompson, acting on the advice of legal counsel of the school district, advised McComb that she must remove the proselytizing remarks from her graduation speech.[6] Am. Compl. ¶¶ 35-43 (Pet. App. 30-32).

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5. Although this memorandum was argued at the lower court levels, and referenced by Petitioners in the Amended Complaint, it is noticeably absent from Petitioners' Appendices.

6. Despite numerous attempts to clarify this point with Petitioners, the Respondents again reiterate that the handwritten comment is "ditto" and not "deity." (Pet. App. 7, 59).

Not surprisingly, the instant Petition does not include the full text of McComb's unedited speech. A reading of the actual text of the speech reveals that the language was indeed proselytizing. It also reveals that McComb *did not* write primarily in the first person as argued by Petitioners. Specifically, the School Officials required removal of the following proselytizing remarks in McComb's speech:

> God's love is so great that he gave *His only son up to an excruciating death on a cross so His blood would cover all our shortcomings and our relationship with Him could be restored.* And he gave *us* a choice to live for *ourselves* or to live for something greater than *ourselves* - eternity and His Love.
>
> That is why Christ died. John 10:10 says He died so *we* no longer have to reach and fall short, so *we* can have life "and life to the fullest".
>
> * * * *
>
> And I can guarantee, 100%, no doubt in my mind, that if *you* choose to fill *yourself* with God's love rather than the things society tells *us* will satisfy *us*, *you* will find success, *you* will find *your* self worth. *You* will thrive whether *you* attend a prestigious university next fall and become a successful career man or woman or begin a life long manager position at McDonald's tomorrow. Because the fact is *man* has an innate desire to be a part of something greater than himself. That

> something is God's plan. And God's plan for each of *our* lives may not leave *us* with an impressive and extensive resume, but if *we* pursue His plan, He promises to fill *us*. Jeremiah 29:11 says, "'For I know the plans I have for *you*,' declares the Lord, 'plans to prosper *you* and not to harm *you*, plans to give *you* a hope and a future.'" Trust me, this block fits.

(Pet. App. 6-7, 58-59) (emphasis added).

McComb was allowed to give the majority of her speech at the graduation ceremony on June 15, 2006. She was allowed to include, and *did in fact deliver*, numerous statements about her *own personal religious beliefs*, including several references to God and His affect on her own life. (Pet. App. 6, 58, 61); *see* http://www.youtube.com/watch?v=kqzfIitfHjU (last visited Sept. 14, 2009). The School Officials *only* objected to the specific content that included proselytizing remarks that would have run afoul of the Establishment Clause.

3. McComb Did Not Honor Her Commitment To Give The Version Of The Speech She Agreed To Give

After Crehan and Thompson advised McComb that she must remove the proselytizing remarks from her graduation speech, she agreed that she would give the speech without those passages. Am. Compl. ¶ 54 (Pet. App. 34). Immediately prior to the graduation ceremony, district employee Christopher Sefcheck (who was in control of the microphone and amplification system at

the graduation ceremony) advised McComb, as well as the two other valedictorian speakers, that he had been instructed to turn off their microphone if any of them deviated from the approved speeches that had been submitted to Crehan and Thompson. Am. Compl. ¶ 59 (Pet. App. 35).

In blatant disregard of her express assurances to the contrary, upon assuming the podium at the ceremony, McComb began to give the unredacted version of her speech — the version that included the proselytizing remarks that sought to persuade and recruit the audience to accept her particular religious beliefs. Am. Compl. ¶¶ 61-62 (Pet. App. 36). The microphone was turned off by Sefcheck during her speech only when she deviated from the approved script and was half way through the sentence which included the following proselytizing language: "God's love is so great that he gave His only son up to an excruciating death on a cross so His blood would cover all our shortcomings and our relationship with Him could be restored." Am. Compl. ¶62 (Pet. App. 36); (Pet. App. 6, 58, 61); http://www.youtube.com/watch?v=kqzfIitfHjU (last visited Sept. 14, 2009).

4. No Other Speech At The Foothill Graduation Ceremony Included Proselytizing Language

No other speech was edited at the graduation ceremony, because no other speech contained proselytizing language. The Petition focuses heavily on a comparison of the speeches given by co-valedictorians Brittany McComb and Janelle Oehler. However, as recognized by Chief Judge Alexander Kozinski at the

oral argument before the Ninth Circuit Court of Appeals, the language of Oehler's speech is, in fact, "*quite different*" than McComb's speech and contains *no proselytizing language*. *See* Audio: Oral Argument before the Ninth Circuit in McComb v. Crehan, 07-16194 (March 10, 2009), located at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002983; *see also* Am. Compl. ¶ 64C (Pet. App. 38-39).

Oehler spoke of finding a person's *own inspiration* through an analogy to a traditional family spaghetti dinner. Oehler made only *personal first person references* to her *own faith*, and suggested that the audience find their *own inspiration*. Am. Compl. ¶ 64C (Pet. App. 38-39); (*see also* Pet. App. 8, 61). Oehler did not engage in proselytizing:

> And of course our meal is never started without prayer. *My* Heavenly Father plays an extremely important role in *my* life. *I* am confident that *I* would not be standing before you today if *I* had not included Him in *my* life. He is the One who truly understands our individual needs. He is always there to listen, to lead, to guide and to give *me* strength *I* need to keep, when *I* need, and to give *me* the strength that *I* need to keep on going when *I* no longer believe *I* can. *I* would be nothing without Him. *Find your inspiration.* Living with the hope for a brighter future will make a significant difference in our lives, provide us with true inner happiness and personal success. If we strive to be more motivated by inspiration, we will find ourselves

> more satisfied, as if we had enjoyed a complete balanced and nutritional spaghetti dinner.

Am. Compl. ¶ 64C (Pet. App. 38-39) (emphasis added); (Pet. App. 8, 61). Because Oehler's speech contained no proselytizing language, there was no need for the School Officials to edit her speech. The same cannot be said for McComb's speech.

D. Procedural History

Respondents would like to clarify the procedural history with regard to the issue of the timeliness of the interlocutory appeal. To prevent repetition, Respondents will discuss these issues in Section E.1. below.

REASONS FOR DENYING THE PETITION

A. The Ninth Circuit Memorandum Opinion Lacks Precedential Value And Is Therefore Not Certworthy

The Ninth Circuit Memorandum Opinion in this case has little precedential value, and thus lacks sufficient importance to merit review by this Court. First, the decision is unpublished. *See* Ninth Circuit Opinion (Pet. App. 2) ("This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.").

Second, the Ninth Circuit's unpublished opinion does not establish, alter, modify, or clarify a rule of law. It contains no unique factual findings or extensive legal analysis that may be applied by courts in future cases. With regard to the First Amendment issues, it simply cites to

the Ninth Circuit cases of *Cole v. Oroville High School District*, 228 F.3d 1092 (9th Cir. 2000), and *Lassonde v. Pleasanton Unified School District*, 320 F.3d 979 (9th Cir. 2003) which are virtually identical to the instant case. *See* Ninth Circuit Opinion (Pet. App. 2). Therefore, the Ninth Circuit Opinion has little precedential value and is not worthy of review by this Court.

Similarly, the June 18, 2007, Order of the United States District Court for the District of Nevada denying Respondents' motion to dismiss the amended complaint (that was the subject of the appeal to the Ninth Circuit) was only two pages in length and was unpublished. It contains no factual discussion or legal analysis on the issues raised in this Petition. *See* June 18, 2007 Order (Pet. App. 65-66).

The Petition is nothing more than a veiled attempt by Petitioners to have this Court re-examine the Ninth Circuit's prior decisions in *Cole* and *Lassonde*.[7] The Petition is not certworthy, and should be denied.

B. The Ninth Circuit Decision In This Matter Does Not Create A "Split" Among The Circuits On The First Or Fourteenth Amendment Issues That Requires Reconciliation By This Court

Petitioners argue that the decisions of the Eleventh Circuit in *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001), and that of the Eighth Circuit in *Doe ex rel. Doe v. School District of Norfolk*, 340 F.3d

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7. *Lassonde v. Pleasanton Unified Sch. Dist.*, 540 U.S. 817 (2003) (writ of certiorari denied); *Niemeyer v. Oroville Union High Sch. Dist.*, 532 U.S. 905 (2001) (writ of certiorari denied).

605 (8th Cir. 2003), are directly at odds with the Ninth Circuit Opinion in this case. The purported "split" or "confusion" among the Circuits is nothing more than an illusion created by the Petitioners. The Circuit decisions consistently apply the *same legal principles* and are distinguishable based upon the facts of the particular school district policy at issue. Thus, certiorari is not required to bring about uniformity of decisions among the Circuits.

In *Adler v. Duval County School Board*, 250 F.3d 1330, 1331 (11th Cir. 2001), the Eleventh Circuit held that the school system's policy of permitting a graduating student, elected by her class, to deliver an *unrestricted message of her choice* at a graduation ceremony was not facially violative of the Establishment Clause. In *Adler*, the school district *chose to relinquish editorial control* over the graduation speeches. The policy in *Adler* did not contain any restriction on the selection of the student speaker or on the content of the message, and indeed *expressly forbid* involvement of school officials in the particular graduation message. *Id.* at 1136-37. The school policy provided, in part, that "[t]he purpose of these guidelines is to allow students to *direct their own* graduation message *without monitoring or review by school officials.*" *Id.* at 1337 (emphasis added).

The policy at issue in *Adler* is significantly different factually than the Clark County School District policy at issue here, in which the school established the criteria for selecting the speaker and regulated the content of the speech. As noted by the court in *Adler*, "The ability to regulate the content of speech is a hallmark of state

involvement, and the Supreme Court returned repeatedly to that theme in *Santa Fe*." *Adler*, 250 F.3d at 1337. "What turns private speech into state speech in this context is, above all, the additional element of state control over the content of the message." *Id.* at 1341.

Thus, the legal analysis of the Eleventh Circuit in *Adler* proceeded under the *very same legal framework* as the Ninth Circuit's decision, it just reached a different result based upon the factual difference of lack of state-control over the graduation ceremony and student speeches. For example, in this case, unlike *Adler*: (1) McComb was selected and authorized by Foothill's administration to make a valedictory graduation speech; (2) the graduation ceremony was held at the Orleans Arena, which was rented and paid for by the school district; (3) only students selected by Foothill's administration were allowed to speak at the graduation; (4) school officials retained plenary control over all aspects of the graduation ceremony and had final authority to approve the content of McComb's speech; (5) Foothill administration, and the school district's legal counsel, reviewed and edited McComb's speech; (6) the speech was broadcast by a district employee over a microphone and amplification system controlled by Foothill; and (7) the school had a policy of turning off the microphone if the student speech deviated from the approved script. Plainly, the outcome in this case versus the outcome in *Adler* can be explained based upon factual variations rather than conflicting legal theories.

There is also no conflict between the Ninth Circuit's Opinion and the Eighth Circuit decision of *Doe ex rel. Doe v. School District of City of Norfolk*, 340 F.3d 605 (8th Cir. 2003). In *Norfolk*, during a high school graduation ceremony, a school board member was allowed to speak because he had a child in the graduating class. Without the prior knowledge of school district officials, the school board member said a prayer. *Id.* at 608. The Eighth Circuit held that the remarks did not violate the Establishment Clause because the recitation was protected *private speech*. The school had *no control over* and was in *no way involved* in the remarks, and thus there was no threat of participants believing the speech was school endorsement of religion. *Id.* at 612-13.

The Eighth Circuit in *Norfolk* proceeded under the identical legal framework as the Ninth Circuit's decision in this case. The court conducted a detailed analysis of whether the speech constituted "*government* speech endorsing religion, which the Establishment Clause forbids, [or] *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 610. The Eighth Circuit recognized that the degree of school sponsorship and involvement is key. *Id.* at 611. A different result was reached in *Norfolk* based upon the factual differences of a "complete absence of any involvement" by the school district and the "complete autonomy" afforded the speaker in determining the content of his remarks. *Id.* at 612.

In this case, unlike the facts in *Norfolk*, McComb attempted to deliver a proselytizing sermon, the content of which was subject to the primary and ultimate control

of the School Officials. McComb was not given "complete autonomy" over the content of the message as was the speaker in *Norfolk*. *See id.* at 612. Therefore, the different outcomes are easily explained based upon factual variations rather than a genuine split in legal theories.

In summary, the Ninth Circuit's Opinion did not create any "split" or "confusion" among the decisions of the Circuits on this issue. Indeed, Respondents are aware of *no Circuit decision* upholding the right of a student to deliver a proselytizing sermon as part of a school controlled commencement speech at a public high school graduation. There is no reason for the Court to take this matter now.

C. The Ninth Circuit Decision Is Faithful To Supreme Court Precedent

The Ninth Circuit's decision in this matter is wholly consistent with the principles enunciated by this Court in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), and *Lee v. Weisman*, 505 U.S. 577 (1992). The decision also reaffirms the Ninth Circuit's earlier decisions on this very same issue in *Cole v. Oroville High School District*, 228 F.3d 1092 (9th Cir. 2000), and *Lassonde v. Pleasanton Unified School District*, 320 F.3d 979 (9th Cir. 2003).

In *Lee v. Weisman*, this Court held that a school district violated the Establishment Clause when it invited a rabbi to deliver a non-sectarian, non-proselytizing prayer at its graduation ceremony. 505 U.S. at 581, 599. The Court determined that, because the

principal decided that an invocation should be given, chose the rabbi and gave guidelines for the prayer, and the school had a "high degree of control" over the graduation ceremony (including control over the contents and timing of the program, the speeches, the dress code, and the decorum of the students), the prayer "bore the imprint of the State." *Id.* at 587-90, 597. The Court noted that the singular importance of a high school graduation as a once-in-a-lifetime event and the susceptibility of adolescents to peer and social pressure left a dissenting student with the unduly coercive dilemma of participating in the prayer against her conscience or missing her own high school graduation. *See id.* at 592-96, 598. Because dissenting students were given "no real alternative," the Court concluded the school district had in effect "compelled . . . participation in an explicit religious exercise." *Id.* at 598.

Subsequently, in *Santa Fe Independent School District v. Doe*, this Court held that a school district policy, that authorized a student selected by a vote of fellow classmates to deliver a non-sectarian and non-proselytizing "statement or invocation" to "solemnize" varsity football games, violated the Establishment Clause. 530 U.S. at 298 n.6, 317. The Court rejected the argument that the student's prayer was private speech. Not only did the school district authorize the invocation through its own policy and allow the invocation to take place on government property at a government-sponsored, school-related event, it also exercised plenary control over the invocation by placing limitations on its content, allowing only selected students to give the invocation, and broadcasting it over the school's public address system. *See id.* at 302-10. The Court

reasoned that the district's control over and entanglement with the invocation would not only cause an objective observer to perceive that the district endorsed the religious message, but also constituted an "actual endorsement of religion" in public schools. *Id.* at 305-10. Thus, the Court concluded, under the principles articulated in *Lee*, the delivery of the invocation before school football games impermissibly applied social and peer pressure to coerce dissenters to "forfeit" their right to attend the games "'as the price of resisting conformance to state-sponsored religious practice.'" *Id.* at 311-12 (quoting *Lee*, 505 U.S. at 596). The Court further concluded that delivery of the invocation had the "improper effect of coercing those present to participate in an act of religious worship." *Id.* at 312.

Petitioners themselves acknowledge that in *Santa Fe* and *Lee* this Court emphasized "two synergistic factors: the extent of state control and the perceived coercion of students to participate." (Pet. at 21). The Ninth Circuit faithfully employs these same factors. *See* Ninth Circuit Opinion (Pet. App. 2) (citing *Cole* and *Lassonde*); *Cole*, 228 F.3d at 1101-04; *Lassonde*, 320 F.3d at 983-85.

The principles of *Santa Fe* and *Lee* are not limited to "prayer" as suggested by Petitioners. In both cases, this Court repeatedly referenced government sponsorship of religion as well as an impermissible coercion of attendance and participation in a "*religious activity*," "*religious practice*," or "*religious exercise*." *Lee*, 505 U.S. at 586, 587, 588, 589, 592, 593, 594, 596, 597, 598, 599 (this Court repeatedly referenced

"religious activity," "religious practice," and "religious exercise" and did not limit the analysis solely to prayer); *Santa Fe*, 530 U.S. at 302, 307, 308, 309, 312, 313, 317 (same).

Proselytizing, no less than prayer, is a religious practice. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 23 (1989) (stating that proselytizing is a religious activity); *Follett v. McCormick*, 321 U.S. 573, 576-77 (1944) (stating that proselytizing, including preaching and distribution of religious literature, is a religious activity); *Murdock v. Pennsylvania*, 319 U.S. 105, 108-10 (1943) (same); *see also Lassonde*, 320 F.3d at 984 ("'proselytizing, no less than prayer, is a religious practice'" (quoting *Cole*, 228 F.3d at 1104)).

Therefore, application of the principles enunciated in *Santa Fe* and *Lee* to the religious practice of proselytizing at a public high school sponsored and controlled graduation ceremony is *entirely consistent* with both the language and spirit of this Court's precedent. There is *absolutely nothing new* for the Court to decide in this case.

Santa Fe and *Lee*'s faithful application is further evidenced by the fact that they involve the *very same* issues of endorsement and coercion that are present in this case. The school district's plenary control over the Foothill graduation ceremony, especially student speech, makes it apparent that McComb's speech would have borne the imprint of the school district. *See Lee*, 505 U.S. at 590. First, the school district authorized the valedictory speech as part of the district-administered graduation ceremony; it was held at the Orlean s Arena,

which was rented and paid for by the school district; and only selected students were allowed to speak. *See Santa Fe*, 530 U.S. at 302-03. Second, the School Officials retained supervisory control over all aspects of the graduation and had final authority to approve the content of student speeches. *See id.* Finally, the speech was broadcast to the audience over a school-controlled microphone and amplification system. *See id.* at 307. Therefore, allowing McComb to give the original unedited version of her speech at the Foothill graduation would have constituted government endorsement of religious speech similar to the policies found unconstitutional in *Santa Fe* and *Lee*.

The element of coercion in this case also mirrors *Santa Fe* and *Lee*. The critical inquiry under *Santa Fe* and *Lee* to determine if religious activity at a major public school event constitutes impermissible coercion is whether "a reasonable dissenter . . . *could* believe that the group exercise signified her own participation or approval of it." *Lee*, 505 U.S. at 593 (emphasis added). Here, in examining the unedited version of McComb's speech, there is no question that a reasonable dissenter could have felt that her silence would signify her approval or participation in McComb's sermon regarding finding one's inspiration through Christ. (Pet. App. 6-7, 58-59).

As described by this Court in *Lee*, "high school graduation is one of life's most significant occasions." *Lee*, 505 U.S. at 595. The essence of a high school graduation is the participation of all, as a *captive audience*. *See Lee*, 505 U.S. at 630 (students and their families are a "captive audience" at high school

graduation ceremonies) (Souter, J., concurring); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986) (there is a need to protect public school students as a "captive audience" from certain types of speech); *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (the First Amendment permits the government to prohibit offensive speech as intrusive when the "captive audience" cannot avoid the objectionable speech); *see also Lassonde*, 320 F.3d at 985 ("the essence of high school graduation is the participation of all, as a captive audience"). Here, an unwilling participant at the Foothill graduation ceremony could have believed that, through silence, the group exercise signified her approval or acceptance of McComb's proselytizing sermon. Forcing a dissenter at the Foothill ceremony to make the choice between attending the event and participating in the religious practice of proselytizing would not have been constitutionally permissible. *Lee*, 505 U.S. at 595-96.

Although the discussion of applicable Supreme Court precedent should begin and end with *Santa Fe* and *Lee*, Petitioners pepper the Court with a myriad of purported conflicts and hypothetical questions that have no application to the facts of this case. The Court should not be mislead.

Petitioners argue that the School Officials violated the Establishment and Free Speech clauses by "favoring one type of religious speech over another." A closer examination of several of the cases cited by Petitioners reveals that the Ninth Circuit's Opinion is indeed faithful to this Court's precedent.

For example, the School Officials' conduct is not at odds with *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As an initial matter, this argument was not presented at the lower court levels. Petitioners did not cite *Lemon* in their briefs before the United States District Court of Nevada or in their Answering Brief submitted to the Ninth Circuit Court of Appeals. This Court should not decide in the first instance issues not decided below. *See, e.g., Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 n.3 (1999) (argument was neither raised nor considered below, and Court declines to consider it); *N.C.A.A. v. Smith*, 525 U.S. 459, 470 (1999) (Court will not decide in the first instance issues not decided below). Moreover, regulation of proselytizing speech would not result in excessive entanglement with religion in violation of *Lemon*. Quite the opposite is true. The School Officials' conduct was *necessary* to avoid an Establishment Clause violation.

The School Officials' conduct also does not pose an equal protection issue under *Larson v. Valente*, 456 U.S. 228 (1982). Once again, *Larson* was not raised by Petitioners in the lower court proceedings; and this Court should not decide this issue now. *See, e.g., Grupo Mexicano*, 527 U.S. at 319 n.3; *N.C.A.A.*, 525 U.S. at 470. Further, it is evident from the speeches of McComb and Oehler that there was no differential treatment of similarly situated persons. The Ninth Circuit's Opinion is not at odds with *Larson* in finding that the School Officials did not violate McComb's right to equal protection because "they did not allow other graduation speakers to proselytize." Ninth Circuit Opinion (Pet. App. 2); *see also* Audio: Oral Argument before the Ninth Circuit in McComb v. Crehan, 07-16194

(March 10, 2009), located at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002983 (Chief Judge Alexander Kozinski recognized that the speeches of the two valedictorians, McComb and Gehler, were indeed "quite different.").

There is also no conflict with *Rosenberger v. Rector*, 515 U.S. 819 (1995). *Rosenberger* involved religious university students' access to university facilities and publications on a nondiscriminatory basis. Access cases, such as *Rosenberger*, bear no resemblance to graduates and parents gathered for a public high school graduation ceremony under the plenary control of the school district. The Supreme Court has consistently respected the rights of "captive audiences" to be free from intrusive speech. *Rosenberger* is also distinguishable because it involved viewpoint discrimination, which did not occur in this case.

There is also no conflict with *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). In *Good News Club*, this Court struck down a school district regulation that allowed after-hours access to school facilities for all groups except those espousing a religious message. The decision in *Good News Club* hinged on the fact that the school had no valid Establishment Clause interest in precluding the religious speech. *See id.* at 113. In stark contrast to this case, the after-hours meetings in *Good News Club* lacked the imprimatur of the school and involved only the voluntary participation of some students. *See id.* at 115-16.

The Ninth Circuit's Opinion in this case is faithful to this Court's precedent. The well-established authority of *Santa Fe* and *Lee* control in this case, and the Petition should be denied.

D. Any Purported Circuit Split Regarding Viewpoint Discrimination Under *Hazelwood* Is Not Fairly Presented In This Case

Petitioners claim there is "confusion among the Circuits" about the extent to which a school can engage in viewpoint discrimination when enforcing restrictions under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Petitioners' futile attempts to create a purported split among the Circuits should be rejected by this Court.

First and foremost, the *Hazelwood* argument was not raised by Petitioners at the lower court levels. In fact, Petitioners did not even cite *Hazelwood* in their briefs before the United States District Court of Nevada or in their Answering Brief submitted to the Ninth Circuit Court of Appeals. Similarly, the School Officials did not rely upon *Hazelwood* in their briefs. Petitioners should not now be allowed to pose hypothetical splits in authority that have no application to the case at bar. *See, e.g., Grupo Mexicano*, 527 U.S. at 319 n.3; *N.C.A.A.*, 525 U.S. at 470.

Second, the absence of an actual "conflict" or "confusion" related to *Hazelwood* in this case is apparent from the Ninth Circuit's Opinion itself. The Ninth Circuit concluded that there was no First Amendment violation without *any* reference to *Hazelwood* or the level of

scrutiny. The Ninth Circuit found that the School Officials "did not allow other graduation speakers to proselytize." *See* Ninth Circuit Opinion (Pet. App. 2). Accordingly, the Ninth Circuit did not believe the School Officials had engaged in viewpoint discrimination and thus there was no need for the Ninth Circuit to apply *any test* for "enforcing" viewpoint discrimination under *Hazelwood*.

Third, there is no need for this Court to resolve any purported Circuit split because the School Officials' conduct would survive even the highest level of scrutiny under *Hazelwood* since there was no viewpoint discrimination in this case. Respondents did not "regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). McComb's speech was not edited because it concerned the Christian faith as opposed to another sect of religion. Nor was it regulated because it presented a favorable as opposed to negative view of her faith.

Rather, the School Officials' actions represented a permissible *blanket exclusion of proselytizing speech*. *See Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 915 (9th Cir. 2007) (a "blanket exclusion of religious worship services" from the forum was upheld as a permissible content based restriction; religious worship is "not a viewpoint but a category of discussion"); *cf. Rosenberger*, 515 U.S. at 831 (recognizing the distinction between a permissible content based restriction of religion as a subject matter or category versus a prohibited restriction based upon religious viewpoint and perspective). As recognized by the Ninth

Circuit, McComb was the *only* speaker to include proselytizing language in her speech, and therefore hers was the only speech to be edited. *See* Ninth Circuit Opinion (Pet. App. 2).

Petitioners also argue that the Ninth Circuit drew an improper distinction between "nondenominational or civically oriented religious speech" and "sectarian religious speech." (Pet. at 5). No such distinction was made. This Court should reject the Petitioners' attempt to change the focus of the case and cloud the issues. The Ninth Circuit was concerned with *proselytizing* speech — plain and simple. *See* Ninth Circuit Opinion (Pet. App. 2) (referencing McComb's "proselytizing graduation speech" and finding that the school district "did not allow other graduation speakers to proselytize.").

In addition, contrary to Petitioners' contentions, there is no need for the Court to grant certiorari to provide further standards to define proselytizing speech. The Ninth Circuit determined that proselytizing comments are "'designed to reflect, and even convert others to, a particular religious viewpoint.'" *Cole*, 228 F.3d at 1103 (quoting *Doe v. Santa Fe Independent Sch. Dist.*, 168 F.3d 806, 817-18 (5th Cir. 1999)).[8] The edited

8. In *Santa Fe*, this Court reviewed the Fifth Circuit's decision which included the definition of proselytizing speech, and which is consistent with this Court's use of the term "proselytize" in other decisions. *See e.g.*, *Boy Scouts of America v. Dale*, 530 U.S. 640, 690-91 (2000) (in case involving revocation of assistant scoutmaster's Boy Scouts membership due to sexual orientation, this Court used the term proselytize in conjunction with references to advocacy, advancing particular views, and attempts to convert a person from one faith to another).

portions of McComb's speech constituted blatant proselytizing under this definition. It was not a case where fine-lines needed to be drawn. Moreover, even if it were such a case, *arguendo*, the Court in *Lee* expressly recognized that jurisprudence in this area "is of necessity one of line-drawing." *Lee*, 505 U.S. at 598.

Petitioners' argument regarding *Hazelwood* does not present a compelling reason for the Court to hear this case, and the Petition should be denied.

E. The Ninth Circuit Decision In This Matter Does Not Create a "Split" Among The Circuits Concerning The Time Limitation For Filing An Interlocutory Appeal

The Ninth Circuit's decision that there was jurisdiction under Rule 4 of the Federal Rules of Appellate Procedure is not at odds with decisions of other Circuit courts, and is faithful to this Court's decision in *Behrens v. Pelletier*, 516 U.S. 299 (1996).

1. Procedural Background

The School Officials filed a motion to dismiss Petitioners' initial Complaint based, in part, on the doctrine of qualified immunity. *See* Docket for the United States District Court for the District of Nevada ("Court Docket"). On December 18, 2006, the District Court held oral argument on the motion to dismiss and indicated that it would deny the motion in its entirety. *See id.*

On December 21, 2006, Petitioners filed an Amended Complaint which added an additional Defendant and significant factual allegations. *See* Am. Compl. (Pet. App. 17-56).

Subsequently, on January 9, 2007, the District Court entered a written order denying the School Officials' motion to dismiss Petitioners' original Complaint. *See* December 22, 2006 Court Order (Pet. App. 62-64); Court Docket. Contrary to Petitioners' contention, an appeal of the January 9 Order was *not* required. *The original pleading had been rendered void* by the filing of Petitioners' Amended Complaint.

On January 11, 2007, the School Officials filed a motion to dismiss Petitioners' Amended Complaint. *See* Court Docket. It was not merely a "carbon copy" of the first motion, but rather it addressed the new factual allegations and supplemented the School Officials' arguments in response to various observations the District Court had made during oral argument on the first motion. *See* Court Docket.

On June 18, 2007, the District Court entered a written order denying Respondents' motion to dismiss the amended complaint. *See* June 18, 2007 Court Order (Pet. App. 65-66). In the Order, the District Court did not conclude that the second motion to dismiss was improper. It merely suggested that the second motion was similar enough to the first that the District Court did not need to set forth detailed conclusions. *See id.*

On June 28, 2007, the School Officials filed a timely Notice Of Interlocutory Appeal from the District Court's June 2007 Order on the issue of qualified immunity. *See* Court Docket.

2. There Is No Genuine Conflict With Authority From Other Circuits Regarding Appellate Jurisdiction, And The Decision Is Faithful To This Court's Own Precedent In *Behrens*

In this case, the Ninth Circuit determined that it had jurisdiction to hear the appeal under *Knox v. Southwest Airlines*, 124 F.3d 1103 (9th Cir. 1997). Ninth Circuit Opinion (Pet. App. 2). In *Knox*, the district court denied the defendants' first motion for summary judgment based on qualified immunity, and the defendants did not appeal that ruling. The same defendants then filed a second motion for summary judgment based on qualified immunity to "supplement" their previous motion in light of the district court's earlier order. The court also denied that motion, and the defendants appealed. *Id.* at 1105.

On appeal, the plaintiffs in *Knox* argued precisely what Petitioners contend in this case — that the Ninth Circuit should have dismissed the defendants' appeal on the grounds "that it is untimely under Fed. R. App. P. 4(a)(1)" because it was filed more than 30 days after the district court's initial order denying defendants' first motion. *Id.* The Ninth Circuit in *Knox* held that the defendants' notice of appeal filed within 30 days of the court's denial of the defendants' *second* motion for summary judgment was timely. *See id.* at 1106.

In making its decision, the Ninth Circuit in *Knox* relied upon this Court's decision in *Behrens v. Pelletier*, 516 U.S. 299 (1996). In *Behrens*, the Supreme Court held that there was no jurisdictional bar to successive interlocutory appeals of orders denying successive pretrial motions on qualified immunity grounds. *See id.* at 310-11; *Knox*, 124 F.3d at 1106. The Ninth Circuit in *Knox* reasoned that *Behrens* permits appellate jurisdiction over an appeal from the denial of a second motion for summary judgment based on qualified immunity. *Knox*, 124 F.3d at 1106.

Similarly, it is also consistent with *Behrens* for the Ninth Circuit to allow the appeal in this case. Respondents appealed from the denial of the *first* motion to dismiss the Amended Complaint based on qualified immunity. Even if it could somehow be deemed a *second* motion to dismiss, it would still be permissible under *Behrens* as an appeal of the denial of a successive pretrial motion on qualified immunity grounds.

There is no Circuit split on this issue. First, the cases cited by Petitioners all *precede* this Court's decision in *Behrens v. Pelletier*, 516 U.S. 299 (1996), which resolves any purported confusion regarding interlocutory appeal of successive pretrial motions on qualified immunity grounds. Second, the Circuit decisions each are distinguishable based upon the *facts* of the case. *See Phillips v. Montgomery County*, 24 F.3d 736 (5th Cir. 1994) (decision plainly borne out of frustration with the litigants' improper tactics, in that defendants had filed *six motions to dismiss* on remarkably similar complaints); *Fisichelli v. City Known as Town of Methuen*, 884 F.2d 17 (1st Cir. 1989) (did not involve an

appeal from a denial of a motion to dismiss an amended pleading); *Taylor v. Carter*, 960 F.2d 763 (8th Cir. 1992) (no amendment of complaint); *Pruett v. Choctaw County, Ala.*, 9 F.3d 96 (11th Cir. 1993) (same; addressed timeliness of appeal from motion for reconsideration based on qualified immunity); *Armstrong v. Texas State Bd. of Barber Examiners*, 30 F.3d 643 (5th Cir. 1994) (no amendment of complaint).

Finally, Petitioners' argument does not make sense procedurally. The Amended Complaint was already pending at the time Respondents became able to appeal the denial of their motion to dismiss the original Complaint. The Amended Complaint was filed on December 21, 2006, and the Order denying the first motion to dismiss was not entered until January 9, 2007. Am. Compl. (Pet. App. 55); January 9, 2007 Order (Pet. App. 62-64); Court Docket.

Petitioners' Amended Complaint superseded the original Complaint. It is contrary to established law to appeal a denial of a motion to dismiss a complaint which is no longer extant in the case. It is well established that a complaint which has been amended pursuant to Federal Rules of Civil Procedure 15(a) supersedes the pleading it modifies, rendering the original pleading void. *See Pacific Bell Telephone Co. v. Linkline Commc'n Inc.*, 129 S. Ct. 1109, 1122 n.4 (2009); *Bullen v. De Bretteville*, 239 F.2d 824, 833 (9th Cir. 1956) ("It is hornbook law that an amended pleading supersedes the original, the latter being treated thereafter as non-existent."); 6 Wright & Miller, *Federal Practice & Procedure*, § 1476 (same).

Nothing in the well-established precedent of this Court or the Federal Rules of Appellate Procedure suggests that Respondents' course was improper or that the appeal was untimely.

CONCLUSION

Petitioners have asserted no ground in either case law or policy to grant review. The unpublished Ninth Circuit Opinion lacks sufficient precedential value to warrant review by this Court. The Opinion also does not create a split among the Circuits and is entirely faithful to the principles enunciated by this Court in *Santa Fe Independent District v. Doe* and *Lee v. Wiseman*. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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